

**U.S. Department of Labor**

Office of Administrative Law Judges  
36 E. 7th St., Suite 2525  
Cincinnati, Ohio 45202

(513) 684-3252  
(513) 684-6108 (FAX)



**Issue Date: 27 February 2004**

Case No. : 2003-BLA-0143

In the Matter of:

RICKY D. ROBERTS,  
Claimant

v.

QUAD FUEL, INC.,  
Employer

KENTUCKY EMPLOYERS MUTUAL INS.,  
Carrier

and

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS,  
Party-in-Interest

APPEARANCES:<sup>1</sup>

Ricky D. Roberts, *Pro Se*  
Claimant

Greg Little, Esq.  
For the Employer

BEFORE: Robert L. Hillyard  
Administrative Law Judge

DECISION AND ORDER - DENIAL OF BENEFITS

This proceeding arises from a claim filed by Ricky D. Roberts for benefits under the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901, *et seq.*, as amended ("Act"). In accordance with the Act, and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a formal hearing.

---

<sup>1</sup> The Director, OWCP, was not represented at the hearing.

Benefits under the Act are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of persons who were totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising out of coal mine employment, and is commonly known as black lung.

A formal hearing in this case was held in Prestonsburg, Kentucky, on October 29, 2003. Each of the parties was afforded full opportunity to present evidence and argument at the hearing as provided in the Act and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

The findings and conclusions that follow are based upon my observation of the appearance and the demeanor of the witness who testified at the hearing, and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

#### I. Statement of the Case

The Claimant, Ricky D. Roberts, filed a claim for black lung benefits pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, on September 13, 2001 (DX 2).<sup>2</sup> A Notice of Claim was issued on February 25, 2002, identifying Quad Fuel, Inc., as the putative responsible operator (DX 18). On March 26, 2003, the Employer filed its Response to Notice of Claim and Controversion (DX 19). The District Director, OWCP, made an initial determination of nonentitlement (DX 25). The Claimant requested a formal hearing and the claim was referred to the Office of Administrative Law Judges on March 24, 2003 (DX 29).

A hearing was held in Prestonsburg, Kentucky, on October 29, 2003, before the undersigned Administrative Law Judge. The record was held open for 60 days to allow the Employer to submit a reading of the March 22, 2002 x-ray (Tr. 31). Both parties waived closing briefs (Tr. 31).

---

<sup>2</sup> In this Decision, "DX" refers to the Director's Exhibits, "CX" refers to the Claimant's Exhibits, "EX" refers to the Employer's Exhibits, and "Tr." refers to the transcript of the October 29, 2003 hearing.

## II. Issues<sup>3</sup>

The controverted issues as listed on Form CM-1025 are as follows:

1. Whether the Miner has pneumoconiosis as defined by the Act and the regulations;
2. Whether the Miner's pneumoconiosis arose out of coal mine employment;
3. Whether the Miner is totally disabled;
4. Whether the Miner's disability is due to pneumoconiosis;
5. Whether Quad Fuel, Inc., is the Responsible Operator; and,
6. The remaining issues set forth in paragraph 18, as well as the issues as to constitutionality of the Act and its regulations, are reserved for appeal purposes.

## III. Findings of Fact and Conclusions of Law

The Claimant, Ricky D. Roberts, was born on March 14, 1956 (Tr. 15). He completed the 10th grade (Tr. 16). The Claimant has one dependent for purposes of augmentation of benefits; namely, his wife, Christina Roberts (Tr. 15).

The Claimant testified that he has smoked for 30 years at a rate of approximately one pack per day (Tr. 20). This testimony is substantiated by the physician's records (See DX 13, 14, 15). I find, therefore, that the Claimant has smoked one pack of cigarettes per day for the last 30 years and that he continues to smoke.

### Coal Mine Employment

The determination of length of coal mine employment must begin with § 725.101(a)(32)(ii), which directs an adjudication officer to ascertain the beginning and ending dates of coal mine employment by using any credible evidence. At the hearing, the Employer conceded 15 years of coal mine employment (Tr. 13).

---

<sup>3</sup> At the hearing, controversion was withdrawn to the Issues of timeliness and post-1969 employment. The Employer conceded 15 years of coal mine employment (Tr. 12-13).

On his application, the Claimant stated that he worked in coal mine employment for 25 years (DX 2). At the hearing, the Claimant testified that he had 25 "confirmable years" of coal mine employment (Tr. 15). The Miner testified that he worked for Quad Fuel, Inc., two times, once for about 16-18 months around 1995-1997, that he then quit for a period of about four days, and then worked a second period of five or six months "probably in 1997" (Tr. 18). After Quad Fuel, Inc., the Miner worked for South Akers Mining in Phelps, Kentucky, for nine or ten months. He stated that his last coal mine employment was with Southern Auger Company in Virginia for four to five months ending in November 1999 (Tr. 17).

The Claimant testified about the details of his employment history in his May 2, 2002 deposition (DX 5). Mr. Roberts stated that his last coal mine employment was with Southern Augering Company, where he was employed for approximately four to five months (p. 5). He worked for THWC Coal Company for four to five months (p. 5). He stated that he was briefly employed at Husky Coal Company but that it "wasn't very long" (p. 6). He worked less than one year at Loony Tunes Mining Company, K & N Coal Company, Uptown Mining Company, South Akers Mining Company, Sunny Ridge Mining Company, Fools Gold Energy Corporation (two months), and Bevins Coal Company (pp. 6-7). The Miner testified that Quad Fuel, Inc., was the last coal mine employment that he worked at for over one year (p. 9). After Quad Fuel, Inc., the Claimant testified that he worked for South Akers Mining. When asked exactly how long he had worked for South Akers, the Miner testified that "you know, it could have been a year and it could have been eleven months. I really don't know" (p. 14).

The Claimant's Employment History form states that he did not remember the names of the various coal mine employers that he worked for (DX 3). The Claimant's FICA earnings worksheet shows employment with multiple operators with various earnings from 1975 through 1999 (DX 6).

#### FICA Summary

<u>Year</u>	<u>Company</u>	<u>Earnings</u>
1975	J.D.R. Enterprises	\$ 280.00
	LTV Steel Co. Inc.	\$ 4482.65
1976	LTV Steel Co. Inc.	\$12109.88
1977	LTV Steel Co. Inc.	\$ 4989.89

1978	LTV Steel Co. Inc.	\$ 8303.28
	A & T Mining Co. Inc.	\$ 243.53
1979	LTV Steel Co. Inc.	\$20771.03
1980	LTV Steel Co. Inc.	\$20970.16
1981	LTV Steel Co. Inc.	\$ 6344.67
	Kitt Energy Corp.	\$12971.89
	Tuscaloosa Energy Corp.	\$ 5647.86
1982	Kitt Energy Corp.	\$32400.00
1984	Wellaby Coal Inc.	\$ 4847.50
	Belcher Construction	\$ 2452.00
1985	T & C Augering	\$ 2992.50
	Double Eagle Coal Co.	\$ 3473.45
	Coby, Inc.	\$ 3044.75
1987	Red Dog Coal Corp.	\$ 4125.01
	Kinney Branch Coal Co. Inc.	\$ 2422.50
	Glaco Mining Inc.	\$ 3930.00
1988	Red Dog Coal Corp.	\$ 1687.50
	Fountain Blue Coal Co. Inc.	\$ 1160.00
	Britestar Mining Inc.	\$ 2046.85
1989	Fountain Blue Coal Co. Inc.	\$ 5276.50
	Sequoyah Resources Ltd.	\$13999.07
	Ramblin Coal Co., Inc.	\$ 3795.66
1990	Sequoyah Resources Ltd.	\$13998.63
	Rhonda Coal Co. Inc.	\$ 337.50
	Hollow Point Mining Inc.	\$ 3634.63
	Dixie Mining Co. Inc.	\$ 4430.00
	Carbo Mining Co.	\$ 8567.23
	Red Robin Entr. Inc.	\$ 116.88
	Top Gun Coal Co. Inc.	\$ 6900.00
1991	Ramblin Coal Co. Inc.	\$ 7560.00
	Dixie Mining Co. Inc.	\$ 73.85
	Quality Coal Corp.	\$ 2617.50
	Nats Creek Mining Co.	\$ 1453.84
	Danmar Services Inc.	\$ 800.00
1992	Glen Allen Mining Inc.	\$ 876.65
	South Fork Energies Inc.	\$ 2743.69
	South Fork Energies	\$ 1027.63
	Tempest Mining Co. Inc.	\$ 709.56
1993	Ramblin Coal Co. Inc.	\$ 8002.50
	Glen Allen Mining Inc.	\$ 9655.75
	KTK Mining & Const. Co. Inc.	\$ 1566.75
	Moore Mine Service Inc.	\$ 1348.24
	Universal Mining Corp.	\$ 3399.36
1994	Flatwoods Coal Co. Inc.	\$ 1751.25
	Quad Fuel	\$12807.42

1995	Universal Mining Corp.	\$ 978.00
	Quad Fuel Inc.	\$27369.00
	Dry Fork Energy Inc.	\$ 272.00
1996	Quad Fuel Inc.	\$ 3519.00
	High Tech Coal Inc.	\$ 1666.00
	Island Fork Construction LTD	\$ 1487.50
	Bevins Coal Co. Inc.	\$ 400.00
	Fools Gold Energy Corp.	\$ 1000.00
	Woodman Three Mine Inc.	\$ 4378.14
1997	Bevins Coal Co. Inc.	\$ 1600.00
	Fools Gold Energy Corp.	\$ 4000.00
	Sunny Ridge Mining Co. Inc.	\$ 1540.00
	Sout Akers Mining Co.	\$17850.00
1998	Upper Mill Mining Co.	\$ 5097.26
	K & N Coal Co. Inc.	\$ 4861.00
	Looney Tunes Mining Inc.	\$ 904.75

A finding concerning the miner's length of coal mine employment may be based exclusively on the claimant's own testimony where it is uncontradicted and credible. *Bizarri v. Consolidation Coal Co.*, 7 B.L.R. 1-272 (1984); *Gilliam v. G & O Coal Co.*, 7 B.L.R. 1-59 (1984). Similarly, if Social Security earnings records are found to be incomplete, it is reasonable to credit the claimant's uncontradicted testimony in establishing length of coal mine employment. *Niccoli v. Director, OWCP*, 6 B.L.R. 1-910 (1984).

Through the Claimant's own testimony and the Social Security records, it is clear that the Miner worked for several operators over a 25-year period. It is equally clear that he changed jobs frequently, often working for periods of only a few months at each location. The Employer has offered no evidence to rebut the Claimant's testimony. I find that the Claimant has established 25 years of coal mine employment. On his employment history, the Claimant stated that over the relevant period he was a miner operator, shuttle car operator, and a mine foreman (DX 4).

The Claimant's last employment was in the Commonwealth of Kentucky. As such, the law of the Sixth Circuit is controlling.

#### Responsible Operator

Quad Fuel, Inc., has contested its designation as Responsible Operator. In its Operator Response to Notice of Claim, the Employer admitted that it was an operator for any period after 6/30/73, that the operator employed the Miner, as a miner, for a cumulative period of not less than one year, that

the Miner's employment with this operator included at least one working day after December 31, 1969, and that the Employer or its Insurer is financially capable of assuming liability for the payment of benefits (DX 19). The Employer contests that it was the Operator with whom the Miner had the most recent period of cumulative employment of one year (DX 19).

At the hearing, the undersigned reviewed Social Security earning records with Mr. Roberts, questioning him on the names and lengths of employment for several of the listed employers (Tr. 23-28). The Claimant often did not remember the employers by the name listed on the earnings report, and he could not remember how long he had worked for most of the employers. He testified that the same coal mine would often sell out or change names several times over a period of a just a few years and that when he would get laid off from one mine, he would find a coal mining job somewhere new (Tr. 27).

Nothing in the Claimant's testimony, the Claimant's deposition, or the Social Security earnings records rebuts the fact that Quad Fuel, Inc., was the last operator with whom the Miner had the most recent period of cumulative employment of one year. I find that Quad Fuel, Inc., is properly named as the Responsible Operator pursuant to §§ 725.493, 725.494, and 725.495.

#### IV. Medical Evidence

##### X-ray Studies

	<u>Date</u>	<u>Exhibit</u>	<u>Doctor</u>	<u>Reading</u>	<u>Standard</u>
1.	11/28/01	EX 1	Branscomb	Comp. Neg.	Good
2.	11/28/01	DX 13	Hussain	Comp. Neg.	Good
3.	11/28/01	DX 11	Sargent B reader <sup>4</sup> Board cert. <sup>5</sup>	Quality Only	Good
4.	3/22/02	CX 3	Pope B reader	1/0 q/p	Good

---

<sup>4</sup> A "B reader" is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services. See 42 C.F.R. § 37.51(b)(2).

<sup>5</sup> A Board-certified Radiologist is a physician who is certified in Radiology or Diagnostic Roentgenology by the American Board of Radiology or the American Osteopathic Association. See § 718.202(a)(ii)(C).

5.	3/22/02	CX 2	Deponte B reader Board cert.	0/1 s/t	Good
6.	3/22/02	CX 1	Baker	1/2 p/q	Fair
7.	5/6/02	DX 14	Broudy B reader	0/0 multiple calcified granulars	Good

#### Pulmonary Function Studies

	<u>Date</u>	<u>Ex.</u>	<u>Doctor</u>	<u>Age/Hgt</u> <sup>6</sup>	<u>FEV<sub>1</sub></u>	<u>MVV</u>	<u>FVC</u>	<u>Standards</u>
1.	5/6/02	DX14	Broudy Post	46/71" Bronchodilator	4.18 2.79	N/A N/A	4.71 3.52	Tracings included/ poor, inconsistent coop./comp.
2.	11/28/01	DX13	Hussain Post	45/72" Bronchodilator	3.51 3.44	N/A N/A	5.77 5.49	Tracings included/ Fair coop. /comp.

#### Arterial Blood Gas Study

	<u>Date</u>	<u>Exhibit</u>	<u>Physician</u>	<u>pCO<sub>2</sub></u>	<u>pO<sub>2</sub></u>
1.	11/28/01	DX 13	Hussain	38.8	88.0

#### Narrative Medical Evidence

1. Dr. Hussain, a Board-certified Pulmonologist and Internist, examined the Claimant on November 28, 2001 and testified via deposition dated June 5, 2002 (DX 13). Based on symptomatology, employment history, individual and family histories, smoking history, physical examination, chest x-ray (0/0, p. 8), pulmonary function study (mild impairment, p. 9), arterial blood gas study (normal, p. 10), and an EKG, Dr. Hussain opined that the Miner had no objective evidence of coal workers' pneumoconiosis or any other occupational lung disease (p. 8). He listed the etiology of the Miner's mild impairment as cigarette smoking (p. 10). Based on the assumption that the Miner's last position required 8 to 10-hour workdays consisting of extensive manual labor, Dr. Hussain opined that from a pulmonary standpoint, the Miner could return to that type of position (p. 10).

---

<sup>6</sup> I find the Claimant's height to be 71 inches for the purposes of evaluating the pulmonary function studies. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983).



Dr. Hussain's examination report was submitted as a deposition exhibit. Dr. Hussain noted the Miner's smoking history and he noted the findings discussed in his deposition, with the exception of his finding of impairment, which he listed in the report as "moderate." In his deposition, Dr. Hussain stated that on review of the pulmonary function readings, he had made an earlier mistake in classifying the impairment as "moderate," and he amended his written report orally to reflect the correct interpretation of the readings as a "mild" impairment (p. 9).

2. Dr. Ben Branscomb<sup>7</sup> performed a records review at the request of the Employer (DX 15). Dr. Branscomb noted the Miner's employment and smoking history, reviewed narratives provided by Drs. Hussain and Broudy, and he reviewed the x-ray, pulmonary function, and arterial blood gas evidence of record. Dr. Branscomb stated that the B reader physicians found the x-ray evidence to be negative. He opined that both pulmonary function tests were invalid but that even with the quality problems, the results confirm a normal FVC and an almost normal FEV<sub>1</sub>. The arterial blood gas readings were nonqualifying. In conclusion, Dr. Branscomb opined that "there is no objective evidence of any pulmonary disease or impairment of any etiology. There is no medical or legal pneumoconiosis. Mr. Roberts has ample pulmonary function to continue his previous coal mine work."

3. a. Dr. Bruce C. Broudy, a Board-certified Internist and Pulmonologist, examined the Miner on May 6, 2002, and issued a report on his findings (DX 14). Dr. Broudy noted the Miner's employment history (27 years, 23 of which were underground), smoking history (smoked since age 18, one pack per day), symptomatology (lung problems 10-15 years, shortness of breath, daily cough, sputum), personal and family histories, and performed a physical examination (respirations normal, lung had no adventitial sounds), pulmonary function exam (very mild obstruction, patient's effort variable, weaker effort after bronchodilator), and a chest x-ray (category 0). The Miner refused an arterial blood gas study. Based upon the information gathered, Dr. Broudy opined that the lung zones are clear except for several scattered calcifications and that there was no evidence of coal workers' pneumoconiosis. He further diagnosed chronic bronchitis with very mild chronic airways obstruction due to cigarette smoking. Dr. Broudy believes that the Miner "retains the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor."

---

<sup>7</sup> Dr. Branscomb lists no medical specialty credentials in the record.

b. Dr. Broudy testified via deposition dated July 1, 2002 (DX 14). He reiterated the findings of his May 6, 2002 report. Dr. Broudy opined that the Miner suffered from a minor impairment attributed completely to smoking (p. 11). He based this etiology on three factors: 1) the miner had an obstructive defect, which is typical of cigarette smoke-induced lung disease and not typical of the impairment that usually occurs with pneumoconiosis; 2) he had a long continuous smoking history and was still smoking at the time of the exam, while the Claimant had quit coal mining three years earlier; and, 3) there was no evidence of pneumoconiosis or occupational lung disease on the chest x-rays. Taken as a whole, Dr. Broudy opined that objective evidence indicates that cigarette smoking is the most likely cause of the impairment, and there is no need to implicate other factors (p. 12).

#### V. Discussion And Applicable Law

The Claimant filed his black lung benefits claim on September 13, 2001 (DX 2). Because this claim was filed after March 31, 1980, the effective date of Part 718, it must be adjudicated under those regulations.<sup>8</sup>

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. § 718, the claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§ 718.3, 718.202, 718.203, and 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 B.L.R. 2-192 (6<sup>th</sup> Cir. 1997); *Trent v. Director, OWCP*, 11 B.L.R. 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986) (*en banc*).

Section 718.202 provides four means by which pneumoconiosis may be established. Under § 718.202(a)(1), a finding of pneumoconiosis may be made on the basis of x-ray evidence. The record contains six interpretations of three different chest x-rays. The November 28, 2001 x-ray film was read by Dr. Sargent for quality only, and he rated the film as good.

The Board has held that an Administrative Law Judge is not required to defer to the numerical superiority of x-ray evidence, *Wilt v. Wolverine Mining Co.*, 14 B.L.R. 1-65 (1990),

---

<sup>8</sup> Amendments to the Part 718 regulations became effective on January 19, 2001. Section 718.2 provides that the provisions of § 718 shall, to the extent appropriate, be construed together in the adjudication of all claims.

although it is within his or her discretion to do so, *Edmiston v. F&R Coal Co.*, 14 B.L.R. 1-65 (1990). However, "administrative factfinders simply cannot consider the quantity of evidence alone, without reference to a difference in the qualifications of the readers or without an examination of the party affiliation of the experts." *Woodward v. Director, OWCP*, 991 F.2d 314 (6<sup>th</sup> Cir. 1993).

Interpretations of B readers are entitled to greater weight because of their expertise and proficiency in classifying x-rays. *Vance v. Eastern Assoc. Coal Corp.*, *Aimone v. Morrison Knudson Co.*, 8 B.L.R. 1-32 (1985); 8 B.L.R. 1-68 (1985). Physicians who are Board-certified Radiologists as well as B readers may be accorded still greater weight. *Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6<sup>th</sup> Cir. 1993).

The November 28, 2001 x-ray was read as completely negative by Drs. Branscomb and Hussain. I give great weight to the combined readings of Drs. Branscomb and Hussain and find that the November 28, 2001 x-ray evidence is negative for pneumoconiosis.

The March 22, 2002 x-ray was read as negative by Dr. Deponte, a dually certified Radiologist and B reader, and as positive by Dr. Pope, a B reader, and by Dr. Baker, who lists no medical credentials in the interpretation of x-rays. I give greater weight to the dually certified reading of Dr. Deponte over the readings of Drs. Pope and Baker, and find that the March 22, 2002 x-ray evidence is negative for pneumoconiosis.

The May 6, 2002 x-ray was read as negative by Dr. Broudy, a B reader. I find that the May 6, 2002 x-ray evidence is negative for pneumoconiosis.

Having found that each of the three x-rays is negative for pneumoconiosis, I find that the existence of pneumoconiosis has not been established pursuant to 20 C.F.R. § 718.202(a)(1).

Section 718.202(a)(2) is inapplicable because there are no biopsy or autopsy results. Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of the several presumptions are found to be applicable. In the instant case, § 718.304 does not apply because there is no x-ray, biopsy, autopsy, or other evidence of large opacities or massive lesions in the lungs. Section 718.305 is not applicable to claims filed after January 1, 1982. Section 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982.

Under § 718.202(a)(4), a determination of the existence of pneumoconiosis may be made if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. Pneumoconiosis is defined in § 718.201 as a chronic dust disease of the lung, including respiratory or pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.

(1) *Clinical Pneumoconiosis.* "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) *Legal Pneumoconiosis.* "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

#### Section 718.201(a).

For a physician's opinion to be accorded probative value, it must be well reasoned and based upon objective medical evidence. An opinion is reasoned when it contains underlying documentation adequate to support the physician's conclusions. See *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which the diagnosis is based. *Id.* A brief and conclusory medical report which lacks supporting evidence may be discredited. See *Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46 (1985); see also, *Mosely v. Peabody Coal Co.*, 769 F.2d 357 (6<sup>th</sup> Cir. 1985). Further, a medical report may be rejected as unreasoned where the physician fails to explain how his findings support his diagnosis. See *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

Dr. Hussain, a Board-certified Internist and Pulmonologist, based his diagnosis on symptomatology, smoking history, family and individual medical histories, physical examination, chest x-ray, pulmonary function study, and arterial blood gas study. Based on the information gathered, Dr. Hussain opined that the Miner had no objective evidence of coal workers' pneumoconiosis or any other occupational lung disease. He based this finding on a negative x-ray, normal blood gas readings, and a pulmonary function study which revealed a mild impairment (which he opined was due solely to cigarette smoking).

Dr. Hussain's report and deposition are well reasoned. Noting Dr. Hussain's credentials, I find that Dr. Hussain's report is based upon objective data, is well supported by the evidence collected, and is thoroughly explained. I afford his opinion great weight against a finding of pneumoconiosis.

Dr. Broudy, a Board-certified Pulmonologist and Internist, based his diagnosis on symptomatology, employment history, smoking history, family and individual medical histories, physical examination, chest x-ray, pulmonary function study, and arterial blood gas study. Based on the information gathered, Dr. Broudy opined that there was no objective evidence of coal workers' pneumoconiosis. He noted that physical examination showed no evidence of occupational lung disease, the Miner's chest x-ray was negative, the Miner refused an arterial blood gas study which could have offered more evidence, and the pulmonary function study showed a very mild obstruction which he opined was solely due to cigarette smoking.

Dr. Broudy's report and deposition testimony are well reasoned. He utilizes the objective data presented to reach his conclusion that the Miner does not suffer from pneumoconiosis, and then he explains in detail why the data suggests that cigarette smoking is the cause of the slightly abnormal pulmonary function readings. I find his report well documented, well explained, and I note Dr. Broudy's superior credentials. I afford the opinion of Dr. Broudy great weight against a finding of pneumoconiosis.

Dr. Branscomb was a nonexamining physician. A nonexamining physician's opinion may constitute substantial evidence if it is corroborated by the opinion of an examining physician or by the evidence considered as a whole. *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984). Dr. Branscomb based his opinion on the data collected by Drs. Hussain and Broudy, both of whom were examining physicians.

After noting that the B readers found the Miner's x-ray evidence to be negative for pneumoconiosis, Dr. Branscomb opined that despite quality problems with both pulmonary function studies, the readings produced were either normal or near normal. He noted that the arterial blood gas study was nonqualifying. In review, he opined that "there is no objective evidence of any pulmonary disease or impairment of any etiology. There is no medical or legal pneumoconiosis."

Dr. Branscomb's findings are based upon the objective medical data reviewed. Further, his opinion is corroborated by the reasoned opinions of Drs. Hussain and Broudy, both examining physicians, and by the evidence as a whole. I give great weight to this nonexamining physician's opinion supporting a finding of no pneumoconiosis.

Taken as a whole, Drs. Hussain, Broudy, and Branscomb provide well-reasoned opinions, based upon objective medical evidence, that the Claimant does not suffer from pneumoconiosis as defined in § 718.201. Accordingly, I find that the Claimant has not established the existence of pneumoconiosis under § 718.202(a)(4).

#### Causal Connection Between Pneumoconiosis and Coal Mine Work

Because the Claimant has not established pneumoconiosis, the question of whether it is caused by his coal mine employment is moot. Moreover, even though the evidence establishes more than 10 years of coal mine work, any presumption of a causal connection with coal mine employment is more than adequately rebutted by the medical opinion evidence discussed above. Therefore, the evidence fails to establish this element of the claim.

#### Total Disability

Since the Miner does not have pneumoconiosis, his claim cannot succeed. In any event, had he established the existence of the disease, the evidence does not show that he had a totally disabling respiratory or pulmonary ailment which could be attributed to pneumoconiosis. The Claimant must establish by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his total disability. See, e.g., *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4<sup>th</sup> Cir. 1994). Total disability is defined as the miner's inability, due to a pulmonary or respiratory impairment, to perform his or her usual coal mine work or engage in comparable gainful work in the immediate area of the miner's residence. Section 718.204(b)(1)(i) and (ii). Total disability can be established pursuant to

one of the four standards in § 718.204(b)(2) or through the irrebuttable presumption of § 718.304, which is incorporated into § 718.204(b)(1). The presumption is not invoked here because there is no x-ray evidence of large opacities and no biopsy or equivalent evidence.

Where the presumption does not apply, a miner shall be considered totally disabled if he meets the criteria set forth in § 718.204(b)(2), in the absence of contrary probative evidence. The Board has held that under § 718.204(c), the precursor to § 718.204(b)(2), all relevant probative evidence, both like and unlike, must be weighed together, regardless of the category or type, to determine whether a miner is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231, 1-232 (1987).

Section 718.204(b)(2)(i) permits a finding of total disability when there are pulmonary function studies with FEV<sub>1</sub> values equal to or less than those listed in the tables and either:

1. FVC values equal to or below listed table values; or,
2. MVV values equal to or below listed table values; or,
3. A percentage of 55 or less when the FEV<sub>1</sub> test results are divided by the FVC test results.

The record contains two pulmonary function studies. Both studies listed the Miner's effort as either "fair" or "poor." Dr. Branscomb reviewed both tests (as a nonexamining physician) and found both tests invalid. Little or no weight may be accorded to a ventilatory study where the miner exhibited "poor" cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984); *Runco v. Director, OWCP*, 6 B.L.R. 1-945 (1984); *Justice v. Jewell Ridge Coal Co.*, 3 B.L.R. 1-547 (1981). If "fair" effort is noted on the study, the study may be conforming. *Laird v. Freeman United Coal Co.*, 6 B.L.R. 1-883 (1984); *Verdi v. Price River Coal Co.*, 6 B.L.R. 1-1067 (1984); *Whitaker v. Director, OWCP*, 6 B.L.R. 1-983 (1984). A non-conforming pulmonary function study may be entitled to probative weight, however, where the results exceed the table values, i.e., the test is nonqualifying. *Crapp v. U.S. Steel Corp.*, 6 B.L.R. 1-476 (1983). Even if the testing method was sub-standard, all of the reported pulmonary function readings are nonqualifying. I find that the pulmonary function evidence does not support a finding of total disability.

Total disability may be found under § 718.204(b)(2)(ii) if there are arterial blood gas studies with results equal to or

less than those contained in the tables. The record contains one arterial blood gas study, which was nonqualifying.

There is no evidence presented, nor do the parties contend that the Claimant suffers from cor pulmonale or complicated coal workers' pneumoconiosis.

Under § 718.204(b)(2)(iv), total disability may be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine work or comparable and gainful work. There are three medical narratives in the record discussing the Claimant's impairment level. None of the physicians of record opined that the Miner was totally disabled.

As a result of nonqualifying pulmonary testing, normal blood gas testing, and the well-reasoned opinions of Drs. Hussain, Broudy, and Branscomb that the Claimant does not suffer from a total pulmonary or respiratory disability, I find that the Claimant has failed to establish total disability due to pneumoconiosis arising out of coal mine work under § 718.204(b)(2).

#### VI. Entitlement

Ricky D. Roberts, the Claimant, has not established entitlement to benefits under the Act.

#### VII. Attorney's Fee

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for representation services rendered in pursuit of the claim.



VIII. ORDER

It is, therefore,

ORDERED that the claim of Ricky D. Roberts for benefits under the Act is hereby DENIED.

A

Robert L. Hillyard  
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C., 20013-7601. A copy of a Notice of Appeal must also be served upon Donald S. Shire, Esq., 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C., 20210.